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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

United States of America,

Plaintiff,

v. 69 Civ. 200

International Business Machines Corporation,

Defendant.

New York, New York
December 5, 1973
10:30 a.m.

BEFORE:

HON. DAVID N. EDELSTEIN,

Chief Judge

APPEARANCES:

United States Department of Justice
Antitrust Division,
Attorneys for the Plaintiff
Raymond M. Carlson, Esq.,
Joseph H. Widmar, Esq.,
Charles R. Esherick, Esq.,
James I. Serota, Esq., and
Grant G. Moy, Jr., Esq., of Counsel

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Cravath, Swaine & Moore, Esqs.,
Attorneys for the Defendant
Thomas D. Barr, Esq.,
David Boies, Esq.,
Paul M. Dodyk, Esq.,
Wayne Cross, Esq., and
Ronald S. Rolfe, Esq., of Counsel
- and -
Olwine, Connelly, Chase, O'Donnell & Weyher, Esqs.
Charles M. Waygood, Esq. and
Job Taylor, Esq., of Counsel.

THE COURT: Good morning, gentlemen. Are there any opening remarks before we proceed?

MR. CARLSON: I don't believe so, your Honor.

MR. BARR: No, your Honor.

THE COURT: Then we can plunge right into the proposed schedule for completion of discovery, can we not?

I (a), do you wish to make any comment about that? As I understand it, this is a joint response.

MR. BARR: Yes, sir, it is.

MR. CARLSON: I should only reiterate our prior comment as to defining the issues at this point, that they are in the process of study for refinement from the government's side but the refinement of issues will necessarily be a developing thing from that time forward, and I think I would mislead the Court if I did not say that the initial refinement of the issues will be not too great

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of solving the 5 (e) problem at three agencies which have been identified, and providing that this pilot program works out successfully we hope to be able to solve the remaining 5 (e) problems through this method.

THE COURT: I detect more than a faint hope then that (c) of VIII will not really create any problems.

MR. DODYK: That is certainly my hope, your Honor.

THE COURT: We pass to IX, national security privilege.

MR. CARLSON: May I address myself to that, your Honor?

THE COURT: Please do.

MR. CARLSON: Since we last met, and at your Honor's direction, the government made specific visits and held meetings with and discussed the listing of documents and the nature of the national security problems had by each of four agencies.

The schedule before your Honor calls for a report in writing on this Friday, and that is because of the lateness at which some of the materials were received, but if I may I will sketch on the record where we stand because Mr. Barr and I have a dispute as to how we should go knowing where we stand.

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First, the problems with respect to national security materials withheld by the FBI are narrow and specific, but they are important national security problems.

THE COURT: When you say "narrow," do you mean in volume or do you have some other meaning? What do you mean "narrow and specific"? The questions are narrow --

MR. CARLSON: I think they are narrow both in breadth of documents and they are narrow in the nature of the subject matter covered by the national security problems. It is a realizeable and a graspable problem that will, I think, appear quite clearly in a listing that the FBI is preparing now but had not cleared through in time for today's meeting, and I expect and hope that that will be ready for filing on Thursday, and it will define as nearly as we can, without affecting the national security problems by the filing itself, the problem at the Federal Bureau of INvestigation.

The Atomic Energy Commission by our visiting them and by our trading views and meeting with IBM and again with the agency are granting access to numerous and various documents under security conditions. They are in the act of declassifying or trying to declassify or checking for possible declassifying a great number of documents so that

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they can be inspected by IBM, and they are in the process of preparing any list of documents that will be withheld.

They do not have, as I understand it, any document yet listed as being withheld, but some of them will be made available under security conditions.

So that where we are with the Atomic Energy Commission is we think in the process of solving the problem, but it will take a little longer because declassification takes time and the location of the documents takes time, and that is in the process now.

As to the Central Intelligence Agency, Cental Intelligence Agony has written us a letter which we made available to counsel. I think I do not misstate that what they are doing there is very similar to the position that AEC has taken, namely, that they are granting access as fast as they can to documents that are classified.

They are working on the problem of declassifying, and they are working on the problem of listing, but they have not -- because the three things are going on at once they have not completed any of those three.

The letter will be furnished, and it is dated November 30, 1973, to the Court, in the government's written report on Friday.

With respect to the National Security Agency the

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problem was raised with the National Security Agency the day after we last met in court. We first met with the National Security Agency and asked them to reassess their position to see whether there was any basis on which documents could be made available to IBM or listings could be given of documents that fall within IBM's document demand, and we have spent a good deal of the time between then and now discussing this matter with the National Security Agency, in numerous phone calls,and finally on Friday of this past week Mr. Bruce Wilson, whom your Honor knows, the Deputy Assistant Attorney General, and I, met with the second man in the National Security Agency, and with their representatives, and were briefed on the national security problems of producing the documents demanded of that agency by IBM.

From that briefing we concluded that NSA's statutory and national security problems are severe, they are very nearly as broad as the agency is broad. They do prevent compliance with the order as it stands, and they do prevent a listing of the documents in a public context without a breach of national security.

I am representing to your Honor, as I represented to counsel for IBM- that the national security problems at

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National Security Agency in so far as they are raised by IBM's document demands are very real.

I asked the National Security Agency to put in written form as best it could its position. The Court will recall that National Security Agency has already raised in affidavits the statutory bar to disclosure that exists, to disclosure of information in the possession of National Security, so National Security Agency delivered to us just before we came up here, dated December 3, 1973, a letter addressed to Mr. Kauper, head of our division, which outlines as best they can the National Security Agency's problems in even listing the documents.

I might say that the letter in its context does suggest and recommend that the Court visit the National Security Agency for the kind of briefing that the government represented it has had so that the Court could have a first-hand look at the reality of National Security problems.

That letter, the letter of the National Security Agency, will be filed with the government's filing of December 7th, which is contemplated in the schedule.

On the day before we came up here, on Monday of this week, we learend that a national security problem is probably going to be encountered at Naval Ship Engineering

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Center where document discovery by IBM is going on at the present time. The dimensions of that problem are just being noted.

Mr. Esherich of the government's staff has been in touch with the persons at Naval Ship Engineering Center, sometimes referred to as NAVSEC, with IBM, so that the existence of the problem is known. Its dimensions, and whether those problems are solvable by declassification, or other method, examination under security procedures or whatever, we do not know yet, but I felt I should alert your Honor to the fact that one additional national security problem has been isolated since we were last before your Honor.

We have discussed the handling as far as the briefing in this court is concerned and the bringing before the Court the circumstances under which from our standpoint, from IBM's standpoint, IBM is entitled to or may be entitled to documents which have some national security significance, and the government's position has been and is that it is more conserving of the Court's time that we continue with the discovery that IBM has outlined, that we attempt at every agency where national security problems are encountered to solve those problems or narrow them to the narrowest possible point, and that we continue with our

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endeavors to obtain a listing of all documents withheld so that the ballpark of national security problems is known, and that the Court defer until the current discovery program at some ninety or so agencies is very well along the ultimate resolution of any issues of national security that may be raised.

I say this for reasons of conserving the Court's time, and also because I was and am hopeful that from IBM's statement of the issues and from a resolution of the issues that IBM will wish to prove that it will be clear that there is no real need as the government feels that the security, the access to security documents, is not even raised until a real need is shown -- that is, they are privileged for present purposes and that no formal claims of privilege should be launched until the total dimensions of the problem are known and they are narrowed as far down as counsel can narrow them by stipulation, by best efforts to solve the problem, and at that point we should be discussing with the Court further.

I think Mr. Barr doesn't agree with that, and he may want to state his position.

MR. BARR: I would ask Mr. Dodyk to speak to that.

MR. DODYK: I think we are approaching a major

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problem with respect to expediting discovery procedures in this litigation.

If I can, I would just focus on the situation which we have first at the NSA. The document production there originally was commenced pursuant to Pretrial Order No. 2 in 1972. At that time the NSA said it wouldn't produce any documents. It has reiterated that position in its most recent letter. It has gone on to say it wouldn't even produce a list of the documents.

To the best of my knowledge, I don't believe even the Department of Justice attorneys have been permitted to examine those documents, so that they can make any intelligent judgment as to the character of those documents.

The listing and the production of documents was refused in a letter which emphasized the importance of the electronic data processing to that agency, and, indeed, we are informed that the NSA is one of the largest, if not the very largest, user of those services in the federal government.

THE COURT: What is the basis for your information?

MR. DODYK: The basis for our information is information from within the corporation, your Honor, reports

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from our own people.

There is a suggestion in the letter which the NSA has written that your Honor make an ex parte visit to the NSA without the presence, apparently, of counsel for IBM. That suggestion bothers me very much, and I am sure it will concern the Court as well. It seems to me that we ought to get at this problem as we are attempting to get at all other problems, and have prompt rulings on objections of all kinds, and it seems to me that we should with respect to the NSA get them to do something which will advance the adjudication of that problem.

It seems to me the first step in that procedure would be to get them to provide this Court with a listing of the documents responsive to the document demand which is being withheld at that agency, which they have again refused to do.

Going on to the problem which is presented at the CIA, I understand from their letter that they are content to permit IBM personnel to examine a significantly larger body of documents than we have been given heretofore and to list all the documents which they are going to withhold. They state that the information contained on the listing should provide IBM with the capacity to assess whether or not the documents being withheld are ones for

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which they have a legitimate need in this litigation.

I think that is a good start. My problem is that I have no notion of when it is that any of this will be done. I think with respect to the CIA perhaps we should seek to get from the government a date certain by which those documents will be provided for inspection and the list provided.

Concerning the AEC, we have here a problem really of obtaining clearance for IBM personnel. That clearance was requested for an attorney to examine the documents which had been masked and partially withheld on October 25th. I am yet uncertain when action will be taken on the request for clearance.

With respect to the AEC --

THE COURT: Who would be in control of clearance? Where would that clearance be coming from?

MR. DODYK: I assume that will be coming through the Department, your Honor.

MR. CARLSON: That is not correct.

THE COURT: I didn't think so.

MR. CARLSON: This is a Q clearance Mr. Dodyk is talking about, and I may say I have had Q clearance in the past and I am one of the persons involved here, and I haven't received my clearance yet either, and it is

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Atomic Energy Commission clearance, and we have made repeated efforts and requests to have that clearance expedited, but the agency involved refuses to, and I think consistent with its national security needs it must refuse to, rush pellmell into security clearances without touching the bases that need be, and I have been loathe to ask them to do more than give every possible expedition to clearance. That I understand they have done.

MR. DODYK: The difficulty there, your Honor, is that we hear those requests were made, yet no results are forthcoming. It's been well over a month now. I think perhaps the party in charge of the Q clearance should state by what date that clearance will be available, so that we can assess whether it is going to be a serious obstacle to our further discovery.

MR. CARLSON: I think we can ascertain that.

MR. DODYK: With respect to the problem of the FBI, your Honor, I really can't say, because we don't know what it is exactly that the Department is going to provide on December 7th, whether that will satisfy us in resolving this problem or not. That will have to await that presentation by the government.

We do have in the schedule a proposed hearing on which the agencies which have heretofore asserted the

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national security privilege would come before the Court and make a presentation concerning that so that this Court might rule on that issue. It seems to me the overriding consideration, however, is that we should attempt to move these things along, and I am disturbed by the fact so much time has gone by and in the case of the NSA that they have really adopted a position which seems to me intransigent, and offered as the only resolution to that problem is the suggestion that your Honor go down to the NSA to meet with them and, as I say, that procedure concerns me terribly.

MR. CARLSON: I am loathe to leave on the record Mr. Dodyk's characterization of the NSA position as intransigent. It seems to me under the statute those who would permit such examination stand to answer for violation of a statute, so that they really do have a very real problem of national security and statutory obedience to statutory requirements that carry criminal sanctions.

I should also note as to the FBI submission it has not been resolved whether the submission will need to be made in camera or not. It may need to be, and I did not want to indicate -- I am making every effort that it can be made without any necessity for in camera submission, but that decision has not been made, your Honor.

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MR. DODYK: Perhaps the way to cut through some of this is to schedule that hearing and to have --

THE COURT: Schedule what hearing?

MR. DODYK: The hearing referred to in the schedule.

THE COURT: Wouldn't that be premature without having the Court furnished with at least some of the materials Paragraph A says will be furnished?

Let's be practical about a hearing. How can the Court at this time set a date for an evidentiary hearing when it doesn't have the slightest notion of what kind of hearing is necessary or if, indeed, any kind of hearing at all will be necessary.

So we will have to bide our time for that.

MR. DODYK: That is all quite right. My question was posed only in an attempt to suggest some way of making some progress on the NSA question.

THE COURT: You can leave the progress up to me.

MR. DODYK: Yes, your Honor.

THE COURT: We will move it along.

Is the National Security Agency adamant about not even furnishing the Court with a list of documents under the tightest security provisions, or haven't you

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inquired into that?

MR. CARLSON: I have not inquired into that specific question, your Honor. I certainly will.

THE COURT: And what problems will the statute raise as to that?

MR. CARLSON: I do not think it would raise any problem as to that. I raised the issue with the agency whether the statute raises any problem as to cummunication with the Court, and they said that it certainly did not, and I would comprehend that to mean that the furnishing of a list to the Court would not raise any problem.

I would wish to have the Court afford me the opportunity to consult with them before I made a position clear on the record on that, but I feel rather sure that that is included in their wish to have the Court know the depth and breadth of the security problem involved.

THE COURT: And also perhaps at some time to find out whether or not any of these documents have any relevancy or bearing at least from the point of view of the security agency without necessarily indicating that this Court would be bound by their evaluation.

Do I make myself clear?

MR. CARLSON: I believe you do, your Honor.

THE COURT: As we move into this area in greater

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depth perhaps we can come up with some solutions that will prove reasonably satisfactory to IBM. But I think I just have to bide my time until I see what will be forthcoming in the objections that are raised, particularly as to the FBI, when you say there the issues are limited and specific and that the breadth and volume of the documents is not very great.

I did recall that well, didn't I? Isn't that what you said?

MR. CARLSON: Yes, your Honor.

MR. BARR: Your Honor, may I make a suggestion in this area? I don't know what is being discussed with the agencies by the government. I have personally been cleared not ever for Q clearance because I have never had the necessity for that, but I have been cleared to a very high level within the federal government and on a number of occasions, and Mr. Katzenbach certainly has been cleared to a very high level on a number of occasions. A number of people within IBM already know some of this information but because of the security clearance and the conditions thereof they are not free to communicate with us about that information.

What I am trying to say is that there is on our side a pool of people who unarguably are clearable for any

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kind of security problem that may exist, and certainly we can devise a scheme where that information is made available to those people on our side who can be cleared, and to the Court.

I don't think the issue is one on the one hand of a broadcasting to the world this information and, on the other hand, keeping it within the National Security Agency. I think we can devise a system that will limit the disclosure to the Court and to some limited number of people on our side.

I don't think there is any security problem that one of us on this side has not been cleared for or could not be cleared for if proper procedures are followed and proper security measures are being used.

I think we ought to be able to find some way of solving this problem. I would ask through the Court whether these agencies have been put that kind of a disclosure as a possibility.

MR. CARLSON: I think there is very real likelihood that that can be done. It seems to me that is a step down the line, and that the suggestion your Honor raised just prior to that is the first step, and that is to ascertain what if anything the agency can advise as to the relevancy of the documents in its view withheld to

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anything that has to do with anything, so that there can be some zeroing in on the problem of relevancy from the agency's standpoint.

THE COURT: Pardon me for interrupting you, but before they can give you their estimate and view, won't it be necessary to give them a very careful briefing of the issues? And by that I do not mean to say any characterizations or evaluation by one side or the other, I mean an objective view of the issues without any attempt being made to weigh them in the favor of one or to the prejudice of the other. And then wouldn't we have to wait until the issues at least have been refined pursuant to the next cutoff date set forth in this schedule?

MR. CARLSON: That is why I thought it was another step down the line. Yes, your Honor.

THE COURT: Merely to say, "Will you please review these documents and give us your own personal opinion as to relevance," without more I don't think would be very helpful in any event.

They do have a legal staff, don't they?

MR. CARLSON: Yes, your Honor.

THE COURT: Certainly it is conceivable when the issues are at least refined for our purposes pursuant to the date set forth in this schedule that their counsel can

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be briefed both by IBM and the government -- again I mean an objective briefing -- with their counsel present so their counsel can sit down with the appropriate individuals in the security agency for the purpose of giving an opinion as to relevancy within the framework of the issues that have been presented to them.

Certainly there can be no objection to that as I can see it because nobody is going to be bound by it, but I think this might become a very useful tool subsequently.

What do you think about that, Mr. Barr?

MR. BARR: I take it the Court is suggesting that counsel for both sides confer with the Agency in an attempt to elicit this information.

THE COURT: Yes, indeed.

MR. BARR: I think that may well be a useful tack.

I intend for the moment at least to be mute on the subject of what I think these documents will show because of my ignorance of what the national security problems are. I have a strong belief based on information that is not in any way sensitive, I don't believe; I have a strong belief based on a deduction and an analysis, as to what I believe happened and what these documents are going

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to show. I would not like to start spouting that both because it may raise national security problems and I may very well be wrong.

The Court knows very well one of the purposes of discovery is to try to determine whether certain theories of what the facts are are valid or not. I believe in this case very strongly, however, that my theory is absolutely correct. It may very well be that my theory, spouting it now or at any time, would infringe what someone would conceive to be a national security matter, and I don't intend doing that.

I do have a problem with beginning to discuss what the agency thinks the relevancy is because when we get into that discussion I reach a point where in the interests of my client, and in the interests of the full story being told, I have difficulties in holding back with everything that I assume to be so. I simply want to put that on the record, and ask the Court to help me in that regard so I don't stumble inadvertently into something I should not be saying, and I ask Mr. Carlson to help me, because I don't wish to do that.

THE COURT: When and if we reach the point of conferring with the agency, I will make myself available and be present on that occasion. Indeed, before we proceed

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to that step, we will have a conference about how to proceed, about how to state these issues, and we will try to get as much accomplished right here before we presume to appear before the agency.

So we will get at least another chance or two to thrash this issue out. In the meantime, I would certainly suggest that we do all the thinking that we possibly can knowing what the problems are to see what resolutions and alternatives are available to us.

I would also ask you, Mr. Carlson, though you have already suggested that you would, that you discuss all possible options with this agency.

MR. CARLSON: Yes, I certainly will do that.

THE COURT: Can we leave IX?

MR. BARR: Yes, sir.

THE COURT: I find X very troublesome because of the problems that I see lurking. I would not want either IBM or the government on these depositions to accumulate a bundle of objections which will be tossed on this desk at some later date for resolution. I would like to be able to have these objections as they are raised at deposition solved right then and there, so there will be no objections submitted to the Court with papers and perhaps a need for further hearings.

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